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Toward a New Theory of the Fifth Amendment Limitations on Cross-Examination of the Accused

*[E]vidence, even justice itself, like gold, may be bought too dear. It is always bought too dear, if bought at the expense of preponderant injustice.*¹ Jeremy Bentham

The self-incrimination clause of the fifth amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."² The self-incrimination clause has been the subject of great criticism in recent years.³ Many commentators feel that the cost to society of excluding relevant, sometimes crucial, evidence outweighs the individual's need for the protections of the privilege.⁴ The critics of the fifth amendment privilege consider the provision an "outmoded relic of past fears generated by ancient inquisitorial practices that could not possibly happen here."⁵ The courts have been pressured to relax the strict constitutional and evidentiary rules protecting accuseds.⁶

Despite this criticism, the United States Supreme Court will probably resist demands for the overruling of the series of cases, exemplified by *Miranda v. Arizona*, that have fleshed-out the constitutional mandate. Nonetheless, other means of limiting the accused's privilege, including a broad construction of a waiver of the privilege, though more

1. 4 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 482 (A. Hunt ed. 1827).

2. U.S. CONST. amend. V.

3. See generally MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? (1959); Cross, *The Right of Silence and the Presumption of Innocence—Sacred Cows or Safeguards of Liberty?* 11 J. SOC. PUB. TCHRS. L. 66 (1969-71); Givens, *Reconciling the Fifth Amendment with the Need for More Effective Law Enforcement*, 52 A.B.A. J. 443 (1966); Hoffman, *The Distortion of the Fifth Amendment*, 43 N.Y. St. B.J. 330 (1971); Inbau, *Should We Abolish the Constitutional Privilege Against Self-Incrimination?*, 2 CRIM. L. REV. 28 (1955). See generally 8 WIGMORE, EVIDENCE §2250 (J. McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE].

4. See, e.g., Carman, *A Plea for Withdrawal of Constitutional Privilege from the Criminal*, 22 MINN. L. REV. 200 (1937); Givens, *supra* note 3.

5. *Rogers v. United States*, 340 U.S. 367, 376 (1951). (Black, J., dissenting).

6. See note 3 *supra*.

palatable than a complete abolition of the privilege, may be just as effective in whittling away the constitutional protection.⁷ For this reason, courts must be careful to resist the temptation to construe broadly the doctrine of "waivers" of constitutional rights.⁸ The danger of a broad construction of a "waiver" is exemplified by the United States Supreme Court's⁹ treatment of the effects of an accused's testimony on the fifth amendment privilege against self-incrimination.¹⁰

An accused who voluntarily takes the stand and testifies in his own behalf is deemed to have "waived" his fifth amendment privilege to refuse to answer incriminating questions.¹¹ The breadth of his testimonial "waiver" is measured by the scope of "relevant cross-examination."¹² The accused may be compelled to answer all questions within the scope of relevant cross-examination although the questions asked tend to incriminate him of the crime about which he is testifying or of other offenses with which he might be convicted.¹³

By adopting this analysis, the Court impairs the accused's constitutional right. The Court's use of the "waiver" doctrine, as applied to the accused's privilege, does not reflect the traditional definition of a waiver as a voluntary foregoing of a known right or privilege.¹⁴ Although an accused may have the choice of whether to take the stand to testify, the accused, because of this "choice," does not necessarily voluntarily undergo prosecution cross-examination.¹⁵ The Court's varying interpretations of the scope of questioning permitted under the term "relevant cross-examination" militate against the accused's knowledgeable waiver of the privilege.¹⁶ Thus, the impairment of the accused's privilege can not rest on a "waiver" theory. Application of the

7. 340 U.S. at 376 (Black, J., dissenting).

8. *Id.*

9. California follows the federal approach and finds that an accused waives his *state* constitutional privilege by testifying in his own behalf to the extent of the permissible scope of cross-examination. Cross-examination is limited to matters about which the accused is examined on direct. *People v. Ing*, 65 Cal. 2d 603, 611, 422 P.2d 590, 594, 55 Cal. Rptr. 902, 906 (1967).

10. See notes 42-59 and accompanying text *infra*. This comment will hereinafter refer to the fifth amendment privilege against self incrimination as "the privilege."

11. *Brown v. United States*, 356 U.S. 148, 157 (1958); *Powers v. United States*, 223 U.S. 303, 314 (1912). The accused cannot complain of being compelled to take the stand by the force of the government's case. This comment does not address the "waiver" of this aspect of the privilege.

12. 356 U.S. at 154-55. The term "relevant cross-examination" is used here as an amalgamation of the various limits on cross-examination permitted by the Court over the last 90 years. This variance, discussed *infra*, is a major drawback of the Court's present "waiver" doctrine. See notes 83-118 and accompanying text *infra*.

13. *Johnson v. United States*, 318 U.S. 189, 195-96 (1943).

14. See notes 65-69 and accompanying text *infra*.

15. See notes 119-137 and accompanying text *infra*. The argument has been made that there is no difference between the two "waivers" because the accused is aware of the results of his taking the stand and testifying. Knowledge of a burden does not equate with a voluntary decision to undergo that burden. See notes 122-128 and accompanying text *infra*.

16. See notes 83-111 and accompanying text *infra*. This will be true even though the accused has been competently represented by counsel.

“waiver” theory has permitted the Court to avoid confronting and balancing the competing needs of the individual and society. If limitations on the accused’s privilege when taking the stand are deemed necessary, a fresh examination of society’s justifications for impairing the accused’s privilege is warranted. New limitations on the permissible scope of cross-examination of the accused should reflect the accused’s right to exercise his privilege¹⁷ and society’s right to a fair and effective criminal justice system.¹⁸

The purpose of this comment is to suggest that the Court’s present “waiver” doctrine masks a substantial and unjustified impairment of the accused’s privilege and that society’s need for a fair and effective criminal justice system justifies a *forfeiture*¹⁹ of the accused’s privilege to refuse answering *only* those questions which might tend to incriminate him of the charged crime to which he has testified on direct examination. The comment will use the following analysis to achieve this end. First, a historical background will be provided of the fifth amendment privilege, the rules of cross-examination, and the accused’s testimonial waiver. The comment will then examine the propriety of the Court’s analyzing the effects of the accused’s testimony on his fifth amendment privilege in terms of a “waiver” of a constitutional right. This examination will suggest that the principles supporting waivers of constitutional rights are inappropriately applied to the accused’s act of taking the stand and testifying. The accused does not make a knowledgeable or voluntary waiver of the privilege when testifying to limited matters on direct examination. Finally, the comment will demonstrate that the accused’s privilege may be impaired only by the Court’s decision to enforce a *forfeiture* of the accused’s privilege, after a balancing of the rights of the accused and the needs of society. When the accused is required to forfeit his privilege to refuse to answer incriminating questions on cross-examination, in order to testify in his own behalf, his privilege is burdened with the choice of whether to exercise the right to testify. The impairment of the privilege *may* be justified by the need of society to put the accused’s testimony to the rigors of cross-examination to assure the disclosure of the truth. All topics of cross-examination are not, however, essential to that truth-finding process. The comment will suggest that a forfeiture of the accused’s privilege is

17. See notes 150-153 and accompanying text *infra*.

18. See notes 176-183 and accompanying text *infra*.

19. A forfeiture of a right is enforced by society irrespective of the party’s intent to forego that right. Ideally, the forfeiture is justified by a compelling need to require the party to forego the right. See *Illinois v. Allen*, 397 U.S. 337, 342-44 (1970). A waiver of a right is recognized regardless of the presence of any justification. It rests on the subjective state of mind of the party. See *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976). See generally *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-40 (1973).

justified only by those questions which would incriminate him of the crime to which he has testified. The accused should not be deemed to have forfeited his right to assert the privilege to avoid questions incriminating him of offenses to which he has not testified on direct examination to secure acquittal, although relevant to the accused's testimony.

THE FIFTH AMENDMENT PRIVILEGE AND THE LIMITS OF CROSS-EXAMINATION: BACKGROUND

While the fifth amendment does not expressly require a "waiver" when the accused testifies, the amendment nonetheless has been instrumental in the development of the Court's "waiver" doctrine. Thus, review of the history of the relationship between the fifth amendment and the rules of cross-examination is crucial to an understanding of the "waiver" concept.

A. The Fifth Amendment Privilege

The fifth amendment to the United States Constitution requires that no person be compelled in any criminal case to be a witness against himself.²⁰ The privilege has been interpreted to provide greater protection than its drafters could have envisioned.²¹ For example, the privilege has been construed to require that an accused be informed of his right to remain silent and his right to have an attorney present during custodial questioning before the accused may be deemed to have waived the privilege.²² Additionally, the privilege proscribes comment on the accused's failure to take the stand and testify.²³

One of the forces behind the expansion of the protections of the privilege has been the gradual recognition by the states and the federal government of the accused's right to testify.²⁴ At common law, the ac-

20. The fifth amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

21. The drafters of the Constitution included this privilege to protect suspects from the excesses of the English Star Chamber, the Courts of High Commission and other inquisitorial practices. See generally, J. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §114 (2d ed. 1972) [hereinafter cited as McCORMICK]; Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination of America*, 21 VA. L. REV. 763 (1935); see notes 165-166 and accompanying text *infra*.

22. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

23. See *Griffin v. California*, 380 U.S. 609, 616 (1965).

24. For a list of the states, see *Ferguson v. Georgia*, 365 U.S. 570, 577 & n.6 (1961). See generally 2 WIGMORE, EVIDENCE §488 (3d ed. 1940).

cused had to rely upon the presumption that he was innocent of the charges and leave the government to establish his guilt by its own efforts.²⁵ The accused could not be compelled to give evidence against himself, nor was he permitted to testify in his own behalf.²⁶ As the states and Congress²⁷ recognized the accused's right to testify, courts were faced with determining whether, and to what extent, an accused's act of taking the stand and testifying would affect his privilege to refuse to answer incriminating questions.²⁸ The question often was resolved by placing restrictions on cross-examination of the accused.²⁹ These restrictions will next be examined.

B. Rules of Cross-Examination

The rule followed in England and approximately ten states is that cross-examination of a witness may be directed to all subjects relevant to *any* issue in the case.³⁰ Cross-examination may extend beyond the scope of the witness' direct testimony and is limited only by the evidentiary rules governing relevancy.³¹

The federal courts and most state courts follow the rule that cross-examination is limited to the subject matter of direct examination.³² This principle is codified in Rule 611(b) of the Federal Rules of Evidence, which provides that cross-examination should be limited to the subject matter of direct examination and to matters affecting the credibility of the witness.³³ The rule also grants the court discretion to permit inquiry into additional matters, not limited to the subject matter of direct examination, as if on direct examination.³⁴

The federal rule has been subject to varying interpretations. Professor Morgan has said that the term "subject matter"

25. See *Wilson v. United States*, 149 U.S. 60, 65 (1893).

26. See *McGautha v. California*, 402 U.S. 183, 214 (1971).

27. The statute reads:

In the trial of all persons charged with the commission of offenses . . . the person charged shall, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him.

20 Stat. 30 (1878), as amended 62 Stat. 833 (1948) (current version at 18 U.S.C. §3481 (1976)).

28. Many states have privileges similar to the fifth amendment. See, e.g., *State v. Lurch*, 12 Or. 99, 6 P. 408, 410 (1885); *Brown v. Walker*, 161 U.S. 591, 598 (1896) (citing cases indicating the existence of the privilege).

29. E.g., *People v. Ing*, 65 Cal. 2d 603, 611, 422 P.2d 590, 594, 55 Cal. Rptr. 902, 906 (1967); *State v. Saunders*, 14 Or. 300, 308-09, 12 P. 441, 445-47 (1886).

30. McCORMICK, *supra* note 21, §21.

31. McCORMICK, *supra* note 21, §21.

32. McCORMICK, *supra* note 21, §21. Federal courts departed from the English rule of "wide-open" cross-examination in *Philadelphia and Trenton Railroad Company v. Stimpson*, 39 U.S. (14 Pet.) 448 (1840). Justice Story opined that the scope of cross-examination may include all "facts and circumstances connected with the matters stated on direct examination . . ." of the accused. *Id.* at 461.

33. FED. R. EVID. 611(b).

34. *Id.*

may be interpreted to confine the inquiry to matters that would contradict or cause the withdrawal of statements made on direct examination, as, for example, facts that indicated that the witness did not personally perceive the matter to which he testified or the existence of a fact which made that matter impossible. Or the definition may be widened so as to permit questioning of a fact that might be directly and obviously inferred from the matter stated on direct.³⁵

Wigmore has suggested that the scope of "subject matter" cross-examination should extend to the permissible scope of the English rule because "[t]he subject of the direct examination of the accused, properly construed, is the whole fact of guilt or innocence."³⁶

The federal rule is not designed to measure the scope of the accused's fifth amendment privilege when testifying.³⁷ Rather, the rule is a mechanism through which the courts can promote the orderly presentation of the case.³⁸ The discretion given courts to permit cross-examination outside the subject matter of direct examination may ameliorate problems created by the varying interpretations of the scope of cross-examination under the federal rule.³⁹ The uncertainties of the scope of cross-examination under the rule, however, make it an inappropriate measure of the constitutional privilege.⁴⁰ Nonetheless, the United States Supreme Court has appropriated the federal evidentiary rule and made it the measure of the accused's "waiver" of his fifth amendment privilege.⁴¹ The comment will next examine the development of the Court's waiver analysis.

C. Development of the "Waiver" Theory

Courts were not confronted with the impact of the accused's testimony on the fifth amendment privilege until modern statutes recognized the competency of the accused to testify at his own trial.⁴² For this reason, the witness' "waiver" of the constitutional privilege developed in the context of the non-accused witness. The United States Supreme Court summarized the rule as applied to a non-accused witness in *Brown v. Walker*:⁴³

[t]hus, if the witness himself elects to waive his privilege, as he doubtless may do, . . . and discloses his criminal connections, he is not

35. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 60 (4th ed. J. Weinstein ed. 1976).

36. WIGMORE, *supra* note 3, §2276, at 467.

37. FED. R. EVID. 611(b), 1969 Advisory Comm. Notes.

38. FED. R. EVID. 611(b), 1969 Advisory Comm. Notes.

39. See notes 113-118 and accompanying text *infra*.

40. See notes 114-118 and accompanying text *infra*.

41. See notes 42-59 and accompanying text *infra*.

42. See *Brown v. Walker*, 161 U.S. 591, 597-98 (1896).

43. 161 U.S. 591 (1896).

permitted to stop, but must go on and make a full disclosure.⁴⁴

As the rule developed in the federal courts, the witness did not lose his privilege to refuse to answer incriminating questions when he took the stand.⁴⁵ The witness was deemed to have waived his privilege only by admitting guilt or furnishing clear proof of crime.⁴⁶ When the witness had testified in an exculpatory manner, the fifth amendment privilege remained intact and could be invoked to avoid answering questions which could subject the witness to a reasonable danger of incrimination.⁴⁷ When the witness testified in an inculpatory manner, "[a]s to each question to which a claim of privilege [was] directed, the court [had to] determine whether the answer to that particular question would subject the witness to a 'real danger' of further incrimination."⁴⁸

When the Court first was faced with the effects of the *accused's* testimony on the fifth amendment privilege, in *Fitzpatrick v. United States*,⁴⁹ the Court again applied a "waiver" analysis, but did not explain the rationale for adopting the waiver concept. In *Fitzpatrick*, the Court found that when the accused waived his fifth amendment privilege to remain silent and instead testified,⁵⁰ he also waived the right to claim the privilege to refuse to answer incriminating questions.⁵¹ The waiver of these rights subjected the accused to cross-examination on his testimony with the "same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime."⁵² The Court did not intend, however, to grant the accused the right of a non-accused witness to invoke the privilege as to questions concerning all facts or offenses to which he has not admitted guilt, despite the Court's misleading language. The scope of John Fitzpatrick's waiver of his privilege was much broader than that of an ordinary witness.⁵³ He was compelled to answer questions concerning the

44. *Id.* at 597.

45. 340 U.S. 367, 373. The rule as applied to the non-accused witness was further refined in *Brown v. United States*, 356 U.S. 148 (1958). In *Brown*, the Court apparently extended the "waiver" rule as applied to accuseds to *all* parties in civil or criminal proceedings offering voluntary testimony. *Id.* at 155. See TEX. L. REV. 343, 346 (1959). This comment addresses only the case of an accused. Nonetheless, to the extent that the "waiver" theory enunciated in *Brown* is invalid, the balancing process suggested by this comment should also be applied to a party to a civil action. A party to a civil action has an interest in testifying, but not always of constitutional dimensions. Society's interests are reduced in that the government is not always a party to the dispute. Most importantly, means of avoiding prejudice to the opposing party exist other than requiring the party to forfeit the privilege. 356 U.S. at 160 (Black, J., dissenting).

46. See *McCarthy v. Arndstein*, 262 U.S. 335, 358 (1923).

47. See *Rogers v. United States*, 340 U.S. 367, 374 (1951).

48. *Id.*

49. 178 U.S. 304 (1900).

50. Fitzpatrick took the stand to deny a charge of murder. *Id.* at 315.

51. See *id.*

52. *Id.*

53. See notes 43-48 and accompanying text *supra*.

charged crime though he had testified in an exculpatory manner.⁵⁴ However, the Court did not find a complete waiver of the privilege. The Court cited two Oregon cases for the propositions that the accused could not be compelled to furnish original evidence against himself⁵⁵ or be compelled to answer questions calling for facts not relevant to his direct examination.⁵⁶ Although the Court claimed that the accused assumed the position of an ordinary witness by testifying, it only confused matters by upholding a waiver of Fitzpatrick's privilege that extended far beyond that of an ordinary witness.

Some of the confusion resulting from *Fitzpatrick* has been clarified by subsequent cases. The Court has explained that the position of an accused and that of an ordinary witness involuntarily on the stand are vastly different.⁵⁷ The accused "waives" his privilege not by merely taking the stand but by giving evidence on direct examination.⁵⁸ The breadth of the accused's waiver is measured by the scope of "relevant cross-examination."⁵⁹

In summary, the gradual recognition of the accused's right to testify forced courts to address the effect of the accused's testimony on his fifth amendment privilege. The United States Supreme Court resolved the tension between the accused's privilege and the prosecution's traditional right to cross-examine witnesses by finding that the accused "waives" his privilege by testifying.⁶⁰ This was the same method used to limit the non-accused witness' fifth amendment privilege.⁶¹ The Court finally discarded the inappropriate "waiver" theory it had used to restrict the fifth amendment privilege of the *non-accused witness* in *Rogers v. United States*.⁶² The Court realized that "[r]equiring full disclosures of details after a witness freely testifies as to an incriminating fact does not rest upon a further waiver of the privilege against self-incrimination."⁶³ The *Fitzpatrick* rule, also based on the "waiver" concept, however, is still being applied.⁶⁴ A re-examination of the "waiver" theory as applied to the accused is, therefore, appropriate.

54. Fitzpatrick was charged with the murder of one Samuel Roberts and testified in an exculpatory manner. 178 U.S. at 314-15. On cross-examination, the government was permitted, over objection, to question Fitzpatrick concerning the day before the murder even though he had limited his testimony to the day of the murder. *Id.* at 315.

55. *Id.* at 316, citing *State v. Lurch*, 12 Or. 99, 102-03, 6 P. 408, 410 (1885).

56. *Id.* at 316, citing *State v. Saunders*, 14 Or. 300, 308-09, 12 P. 441, 447 (1886).

57. See *Brown v. United States*, 356 U.S. 148, 157 (1958).

58. See *id.* at 154-56.

59. *Id.* at 154-55.

60. See notes 49-56 and accompanying text *supra*.

61. See notes 43-48 and accompanying text *supra*.

62. 340 U.S. 367 (1951).

63. *Id.* at 374.

64. See *Brown v. United States*, 356 U.S. 148, 155-56 (1958).

This comment next turns to an examination of the continued applicability of the "waiver" theory.

THE APPLICABILITY OF THE "WAIVER" THEORY

A decision on whether the "waiver" theory should continue to be applied can be best made after a close investigation into the development of the concept. This comment, therefore, will review case law to determine what justification has been given for using the "waiver" principle when the accused testifies. The comment will then examine whether application of the "waiver" concept to testimony by an accused is consistent with traditional waiver analysis.

A. Foundations of the Accused's "Waiver"

Waivers of constitutional rights must be voluntary, knowing, and intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences of the conduct supporting the waiver.⁶⁵ The United States Supreme Court has closely examined any practice or procedure tending to diminish the protection afforded by any provision of the Bill of Rights.⁶⁶ The Court has been especially sensitive to interpretations of constitutional rights that might easily support prosecution allegations of the accused's waiver of those rights. The Court has gone so far in this regard as to implement prophylactic rules designed to assure that an accused's alleged waiver is both knowledgeable and not made under compulsion.⁶⁷ Waivers of constitutional rights are strictly construed⁶⁸ and generally disfavored. Nonetheless, the Court has drastically departed from this traditional waiver analysis by treating the accused's testimony as a waiver of the privilege.⁶⁹ The Court's reason for such a far-reaching extension of the waiver theory is not clear. The Court's earliest case dealing with the accused's testimonial waiver, *Fitzpatrick v. United States*,⁷⁰ failed to provide a reason for the departure.

Although announcing a new rule of law, the Court did little to clarify the theoretical underpinnings of the accused's waiver of the fifth amendment privilege. The Court cited no authority when it enunciated the "waiver" principle:

Where an accused party waives his constitutional privilege of silence,

65. See, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

66. E.g., *Jackson v. United States*, 390 U.S. 570, 582 (1968); *Simmons v. United States*, 390 U.S. 377, 394 (1968).

67. See *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

68. See *Smith v. United States*, 337 U.S. 137, 150 & n.11 (1949).

69. See notes 83-137 and accompanying text *infra*.

70. 178 U.S. 304 (1900).

takes the stand in his own behalf and makes his own statement, *it is clear* that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime.⁷¹

Rather than finding a voluntary and intentional foregoing of a known right or privilege, the Court simply said that it knew of "no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are."⁷²

Since *Fitzpatrick*, the Court repeatedly has relied on the accused's "waiver" to curtail the protection of the fifth amendment privilege, but has consistently failed to examine thoroughly the applicability of waiver principles.⁷³ In fact, only Justice Frankfurter, in *Brown v. United States*,⁷⁴ has attempted to articulate the Court's reasons for finding a waiver when the accused testifies.

Brown was a civil proceeding of denaturalization.⁷⁵ The United States government sought defendant Brown's denaturalization for fraudulently procuring citizenship.⁷⁶ Brown testified at the denaturalization proceeding that she had truthfully sworn, at the time she procured her citizenship in 1946, to not having been a member of the Communist party.⁷⁷ She was later held in contempt for refusing to answer questions relating to her activities after 1946.⁷⁸ Justice Frankfurter, writing for the Court, held that Brown had waived her privilege by testifying as she did.⁷⁹ The Court thereby extended the rule, formerly applied only to accuseds,⁸⁰ to defendant Brown's testimony. Justice Frankfurter justified the extension of the rule by pointing out the three reasons that he claimed supported finding a waiver by any party who testifies in a criminal or civil proceeding: (1) the ability of the accused, and any witness who voluntarily takes the stand, to determine "the area of disclosure and therefore of inquiry"; (2) the accused's ability to choose, after weighing the advantage of the privilege against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify; (3) and the interests of the other party and

71. *Id.* at 315 (emphasis added).

72. *Id.*

73. *See, e.g.,* *Raffel v. United States*, 271 U.S. 494, 497 (1920); *Powers v. United States*, 223 U.S. 303, 315 (1912).

74. 356 U.S. 148 (1958).

75. *Id.* at 149. *See Luria v. United States*, 231 U.S. 9, 27 (1913).

76. 356 U.S. at 149.

77. *Id.* at 150.

78. *Id.* at 152.

79. *Id.* at 154-55.

80. *See* notes 49-59 and accompanying text *supra*.

regard for the function of courts of justice to ascertain the truth.⁸¹

The accused's ability to define the scope of cross-examination by limiting his testimony on direct examination supports the Court's claim that the accused is able to waive the fifth amendment privilege with a sufficient awareness of the likely consequences of the waiver. The accused's choice to testify, with knowledge that he will undergo cross-examination subject to a waiver of the privilege, supports the Court's claim that the accused voluntarily waives the privilege. In the abstract, the Court's reasoning⁸² fully supports the finding of an intentional and voluntary foregoing of a known right or privilege. This "waiver", however, as *applied* to the accused, is *not* voluntary or knowing. Both assumptions made by the Court, voluntariness and knowledge, are fundamentally unsound. A thorough examination of the foundation of the accused's waiver is necessary to assure that abstract principles do not result in the broad construction of a "waiver" of the accused's fifth amendment privilege.

B. A Knowing Waiver?

The rationale of a waiver of constitutional rights suited the Court's use of the evidentiary rules of cross-examination to measure the breadth of the accused's waiver of the privilege. The accused supposedly is able to determine the scope of cross-examination by limiting his direct examination.⁸³ The court has failed, however, to apply consistently the federal rule of cross-examination as the measure of the accused's waiver.⁸⁴ Some of the Court's opinions have approved cross-examination of the accused outside the subject matter of his direct examination.⁸⁵ Moreover, the federal rule of cross-examination, even if consistently applied, is a difficult standard for a court to apply and is an arbitrary measure.⁸⁶ These factors militate against a knowing waiver of the privilege and illustrate the inappropriateness of the Court's waiver theory.

The Court's definition of "relevant cross-examination" has varied over the years.⁸⁷ The Court's most recent case, *Brown v. United*

81. 356 U.S. at 155-56.

82. The final considerations set out in *Brown*, the interest of the other party and regard for the function of the court to ascertain the truth, do not affect the voluntariness of the accused's waiver or the ability to knowingly waive the right. While these are relevant considerations, and must form the basis of any impairment of the accused's privilege required by his voluntary testimony, they do not support a waiver of a constitutional right.

83. *Id.* at 155.

84. See notes 87-111 and accompanying text *infra*.

85. See notes 93-111 and accompanying text *infra*.

86. See notes 112-118 and accompanying text *infra*.

87. At one time, the accused's waiver was thought to be complete. *Raffel v. United States*, 271 U.S. 494, 497 (1926). The proper scope of cross-examination was, therefore, merely an evi-

States,⁸⁸ tends to support the application of the federal "subject matter" rule of cross-examination.⁸⁹ The Court's opinion suggests that application of the federal rule of cross-examination is the proper measure of the accused's waiver. Justice Frankfurter emphasized the ability of the accused and any witness who voluntarily takes the stand, especially a party to the proceeding, to determine the area of disclosure and therefore of inquiry.⁹⁰ Arguably, an accused can determine the area of inquiry only under the federal rule governing the scope of cross-examination⁹¹ since the federal rule restricts cross-examination of a witness to the subject matter of that witness' direct examination.⁹² The United States Supreme Court, however, has sanctioned cross-examination of the accused outside the scope of direct examination.

In *Powers v. United States*,⁹³ defendant Powers was charged with having in his possession an unregistered still and distilling apparatus for the production of spiritous liquors.⁹⁴ Powers testified at his preliminary hearing that he had been hired to beat apples by one Preston Powers on the date alleged, but that he had no interest in the apples or their product.⁹⁵ On cross-examination, Powers was compelled to answer questions concerning his work at a distillery within two years of the date of the warrant.⁹⁶ The defendant's statement that he had worked at a distillery the previous fall was later introduced at his trial.⁹⁷ The Court upheld Powers' conviction, finding that he had waived his constitutional privilege.⁹⁸ Since he took the stand and offered testimony tending to prove his innocence, he was required to submit to cross-examination concerning *any matter pertinent to the examination in chief*.⁹⁹ The questions did not exceed the proper limits of cross-examination, in the Court's opinion, because they tended to show that the defendant "knew the character of the occupation at the time charged."¹⁰⁰ The *Powers* Court thereby sanctioned cross-examination

dentiary consideration and was left to the individual states. See *id.* In *Powers v. United States*, 223 U.S. 303 (1912), cross-examination was permitted to any matter pertinent to the examination in chief. *Id.* at 315. See notes 93-100 and accompanying text *infra*.

88. 356 U.S. 148 (1958).

89. See notes 32-36 and accompanying text *supra*.

90. 356 U.S. at 155.

91. See notes 32-36 and accompanying text *supra*.

92. For a similar argument, see Carlson, *Cross-Examination of the Accused*, 52 CORNELL L.Q. 705, 716 (1966-67).

93. 223 U.S. 303 (1912).

94. *Id.* at 310.

95. *Id.* at 311.

96. *Id.*

97. *Id.*

98. *Id.* at 314.

99. *Id.* at 315.

100. *Id.* at 316.

of Powers that arguably was well *outside* the subject matter of his direct examination.

The Court's opinion in *Johnson v. United States*,¹⁰¹ moreover, supports the application of the English "wide-open" rule of cross-examination.¹⁰² In *Johnson*, the defendant was indicted for income tax evasion for the years 1935, 1936, and 1937 for not reporting large sums of money received from the "syndicate."¹⁰³ On direct examination, the defendant, while testifying, admitted that he had received the sums of money up to November 1937, accounted for the absence of the sums in his income tax reports, and denied having received any money from the "syndicate" during November or December of 1937.¹⁰⁴ The government asked the defendant whether he had received the payments in 1938.¹⁰⁵ The trial court upheld the defendant's assertion of the fifth amendment privilege but allowed the government to comment on the defendant's assertion of the privilege.¹⁰⁶ The Court found that the:

[i]nquiry into [defendant's] income for 1938 was relevant to the issue in the case. As contended by the prosecution, the receipt of money from the numbers syndicate prior to November, 1937 and after December, 1937 might well support a finding of the jury that in view of all the circumstances the payments were not in fact interrupted during the last two months of 1937. . . . That line of inquiry therefore satisfied the test of relevancy and was a proper part of cross-examination.¹⁰⁷

The opinion cited Wigmore for the proposition that the accused's "voluntary offer of testimony upon *any fact* is a waiver as to *all other relevant facts*, because of the necessary connection between them all."¹⁰⁸ Wigmore has been a proponent of the English rule of cross-examination, even as applied to the accused.¹⁰⁹

Federal intermediate appellate courts have usually followed the federal "subject matter" rule of cross-examination.¹¹⁰ Nonetheless, a number of courts, drawing on the language in *Johnson*, have author-

101. 318 U.S. at 189.

102. See notes 30, 31 and accompanying text *infra*.

103. 318 U.S. at 190.

104. *Id.* at 191.

105. *Id.*

106. *Id.* at 192-93.

107. *Id.* at 195-96.

108. *Id.* at 195 (emphasis added for "any fact").

109. See WIGMORE, *supra* note 3, §2276, at 459-62. The effect of the rule proposed by Wigmore is,

[t]hat the accused, as to all facts whatever (except those which merely impeach his credit and therefore are not directly related to the charge in issue) has signified his waiver by the initial act of taking the stand.

WIGMORE, *supra* note 3, §2276, at 459-62.

110. See Carlson, *Cross-Examination of the Accused*, 52 CORNELL L.Q. 705, 712 & n.20 (1966-67); Note, *The Scope of Cross-Examination*, 24 IOWA L. REV. 584, 568 (1939).

ized cross-examination that has gone beyond the subject matter of the accused's direct examination.¹¹¹ The significance of the divergence of opinions lies not in its suggestion of a need for an authoritative statement by the Court, but in its effect on the accused's ability to predict the scope of his fifth amendment waiver, thereby suggesting that the waiver theory is inappropriate.

In summary, the Court appears to have sanctioned the application of conflicting rules of cross-examination of the accused. The Court has at various times approved the application of the federal "subject matter" rule, and English "wide-open" rule of cross-examination, and cross-examination that concerns any matter "pertinent to the examination in chief" though arguably outside the subject matter of direct examination. The intermediate appellate courts have demonstrated a similar diversity of rules of cross-examination.

The federal "subject matter" rule of cross-examination, if universally adopted and applied by the courts, as suggested in *Brown v. United States*,¹¹² would give the accused scant help in determining the scope of the waiver of his privilege to be enforced by the courts. The principal merit of the "subject matter" rule of cross-examination is its tendency to promote the orderly presentation of the case.¹¹³ Despite this advantage, critics have claimed that the restrictive rule is

productive in the courtroom of bickering over the choice of the numerous variations of the "scope of the direct" criterion, and of their application to particular cross-questions. Observance of these vague and ambiguous restrictions is a matter of constant . . . concern to the cross-examiner.¹¹⁴

As a rule of evidence, these problems may not be significant.¹¹⁵ But as a measure of a constitutional privilege, they become critical. The scope

111. *E.g.*, *United States v. Hearst*, 563 F.2d 1331, 1340-41 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978); *United States v. Brannon*, 546 F.2d 1242, 1246 (5th Cir. 1977); *United States v. Palmer*, 536 F.2d 1278, 1282 (9th Cir. 1976); *United States v. Dana*, 457 F.2d 205, 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972); *United States v. Weber*, 437 F.2d 327, 334-35 (3d Cir. 1970) (*dicta*), *cert. denied*, 402 U.S. 932 (1971); *United States v. Dillon*, 436 F.2d 1093, 1096 (5th Cir. 1971); *Nash v. United States*, 405 F.2d 1047, 1054 (8th Cir. 1969); *Bolling v. United States*, 18 F.2d 863, 865 (4th Cir. 1927).

112. 356 U.S. 148 (1958). This assumes that the measure of the accused's waiver is of constitutional origins. There is some doubt, however, as to the validity of this assumption. The Court's most recent examination of the effects of the accused's testimony on the fifth amendment privilege occurred in 1958, six years before *Malloy v. Hogan*, 378 U.S. 1 (1964), extended the fifth amendment protection to accuseds on trial in state courts. Commentators are divided on the question. Compare Carlson, *Cross-Examination of the Accused*, 52 CORNELL L. Q. 705, 716 (1966-67); 45 N.C. L. REV. 1030-32 (1967); 37 TEX. L. REV. 343, 344 (1970) with Sobel, *The Privilege Against Self-Incrimination "Federalized"*, 31 BROOKLYN L. REV. 1, 42 (1964); Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 433-34 (1964); 41 MO. L. REV. 114, 118 (1976).

113. FED. R. EVID. 611, 1969 Advisory Comm. Notes.

114. *Id.*, quoting McCORMICK, *supra* note 21, §27, at 55.

115. The other party may always introduce evidence during his case-in-chief or in rebuttal.

of a constitutional right should not be measured by a rule that is susceptible of varying interpretation by the courts and the subject of argument *after* the right is deemed to have been waived. Under these conditions, the privilege becomes a trap for the unwary rather than a safeguard for the innocent.¹¹⁶

The Federal Rules of Evidence attempted to ameliorate the evidentiary drawbacks of the restrictive rule by granting the court discretion to permit inquiry into additional matters, not limited to the subject matter of direct examination, as if on direct examination.¹¹⁷ While this may solve any *evidentiary* problems faced by a witness not threatened with questions requiring incriminating responses, it would merely compound the dilemma of a witness attempting to determine the scope of his constitutional right. The grant of discretion to the court to permit cross-examination outside the subject matter of the witness' direct examination would only place the accused, faced with waiving his privilege by testifying, in the difficult position of having to guess the predilections of the particular judge he finds himself before. Both the vagueness of the "subject matter" rule and its grant of discretion to the court detract from the propriety of using the evidentiary rule of cross-examination to measure the accused's constitutional privilege. As the commentators to the Federal Rules of Evidence recognized "[i]n all events, the extent of the waiver of the accused's privilege against self-incrimination ought not to be determined as a by-product of a rule of cross-examination."¹¹⁸

In summary, the Court has sanctioned varying limitations of the proper scope of cross-examination of an accused. The resulting confusion, reflected in the decisions of the intermediate appellate courts, detracts from the accused's ability to predict the scope of cross-examination to which he will be subjected. Moreover, the Court cannot alleviate the danger by definitively sanctioning the application of the "subject matter" rule of cross-examination. The "subject matter" rule suffers from the drawbacks of vagueness and varying interpretations. As a result, the inability of the accused to ascertain the breadth of his waiver detracts from the Court's claim that the accused's waiver is made with sufficient knowledge of its effects.

This section of the comment has demonstrated that serious questions exist concerning the ability of the accused to make a *knowing* waiver of the privilege. Because this problem could be solved by a clearer defini-

116. See *Rogers v. United States*, 340 U.S. 367, 378 (1951) (Black, J., dissenting).

117. FED. R. EVID. 611(b), 1969 Advisory Comm. Notes.

118. *Id.* See McCORMICK, *supra* note 21, §132, at 279-80.

tion of the proper scope of cross-examination, the inquiry must turn next to the question of the voluntariness of the "waiver."

C. A Voluntary Waiver?

A waiver involves a *voluntary* foregoing of a known right or privilege.¹¹⁹ In *Brown v. United States*,¹²⁰ the Court supported its claim that an accused's "waiver" of the fifth amendment privilege is voluntary by emphasizing the ability of the accused to refrain from taking the stand in his own behalf.¹²¹ Though the accused may have a "choice" of whether to remain silent or take the stand, it is submitted that the choice to "waive" the privilege on cross-examination is not voluntary.

In *Brown*, the Court apparently confused the accused's decision to take the stand, coupled with knowledge of the Court's doctrine requiring his waiver of the privilege, with the accused's *voluntary* and *intentional* decision to subject himself to prosecution cross-examination by testifying.¹²² The accused's assumption of the role of a witness is not inconsistent with a retention of the privilege. The accused's ability to choose between taking the stand and remaining silent was never meant to be the talisman of all fifth amendment privilege considerations.¹²³ "[T]he rule that the privilege is waived by taking the stand developed in criminal cases as an historical corollary of the fact that the accused could not even be called or sworn as a witness,"¹²⁴ not as a result of the dictates of the language or history of the fifth amendment. The protections of the privilege are not limited to preventing the accused from being called to the stand by the prosecution at his criminal trial.¹²⁵ The accused could, in theory, take the stand, testify in his own behalf, and yet be free from all prosecution cross-examination.¹²⁶ The Court therefore begs the question when claiming that an accused voluntarily waives the privilege by testifying to limited issues, because the accused is expected to know of the Court's present view requiring the accused to

119. See notes 65-68 and accompanying text *supra*.

120. 356 U.S. 148 (1958).

121. See *id.* at 155.

122. See *Simmons v. United States*, 390 U.S. 377, 393 (1968). But see *McGautha v. California*, 402 U.S. 183, 212 (1971).

123. The accused was not competent to take the stand at the time the fifth amendment was drafted. See notes 24-29 and accompanying text *supra*.

124. *Brown v. United States*, 356 U.S. 148, 162 (1958) (Brennan, J., dissenting) citing 8 WIGMORE, EVIDENCE §2268 (3d ed. 1940).

125. For example, even if the accused did not take the stand, the fifth amendment privilege was threatened by the ability of the prosecution to comment on the accused's silence. This impairment of the privilege was not totally remedied by the Court until *Griffin v. California*, 380 U.S. 609, 615 (1965).

126. Wigmore suggests that this is the English rule. WIGMORE, *supra* note 3, §2276, at 469. See *Regina v. Garbett*, 175 Eng. Rep. 196, 204 (1847).

forego his privilege by taking the stand.¹²⁷ “[W]aiver through testimony is a fiction—the witness is *held* to have waived his right for reasons which often have little to do with his subjective desire.”¹²⁸ Although the decision to take the stand and subject himself to cross-examination may, as an abstract principle, be voluntary, the accused is forced to undergo cross-examination for reasons other than the courts’ recognition of the accused’s voluntary choice.¹²⁹

An extension of this waiver theory would permit the Court to condition the accused’s ability to assert various statutory and constitutional rights on the accused’s decision to exercise a preliminary option, by claiming that the accused’s “preliminary decision” acts as a “waiver” of the other statutory and constitutional rights. The Court generally has avoided this type of analysis.¹³⁰ For example, in *McGautha v. California*,¹³¹ the Court addressed the constitutionality of an Ohio statute that provided a unitary proceeding to determine the guilt and penalty phases of an accused’s trial.¹³² The statute was attacked on fifth amendment grounds because it created a burden on the accused’s fifth amendment privilege by exerting considerable force to compel the accused to waive the privilege and take the stand in order to testify at the penalty phase of the trial.¹³³ The Court could have found that the right to testify to penalty *necessarily* includes the duty to testify to guilt and that the accused waives any impairment of the privilege created by the statute when he chooses to take the stand. The Court eschewed this opportunity to find a broad “waiver” of the privilege and rather used an analysis that initially required an examination of whether compelling the election between the privilege and the right to testify impairs to any appreciable extent any of the policies behind the rights.¹³⁴ This test required an examination of the policies of the privilege,¹³⁵ not just the imposition of a state of mind on the accused.

Whether the accused should retain the privilege when he takes the stand and testifies must be distinguished from the effect to be given conduct by the accused indicating his intent to forego the exercise of a

127. See *Jenkins v. United States*, 447 U.S. 231, 251 (1980) (Marshall, J., dissenting).

128. Comment, *Waiver of the Privilege Against Self-Incrimination*, 14 STAN. L. REV. 811, 812-13 (1961).

129. See 390 U.S. at 393-94. But see 402 U.S. at 212.

130. See *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976); *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967); *Brooks v. Tennessee*, 406 U.S. 605, 610-11 (1972) (the Court necessarily rejected the dissent’s arguments that even if the defendant did take the stand, the choice was burdened only by the weight of the prosecution’s evidence).

131. 402 U.S. 183 (1971).

132. *Id.* at 191-92.

133. See 406 U.S. at 615 (Burger, J., dissenting).

134. 402 U.S. at 213.

135. See notes 81, 82 and accompanying text *supra*.

right. The first question requires an analysis of the policies of the privilege and the interests of the accused in exercising his privilege unfettered by external pressure.¹³⁶ Avoiding this analysis, by finding a voluntary choice, can result in an impairment of the privilege.

When rights are deemed waived through . . . attribution to conduct of assertive significance it will not reasonably bear, . . . the rules of criminal procedure have lost most of their meaning. To be sure, it may prove impossible for courts to determine whether a surrender of rights is truly 'voluntary.'¹³⁷

If the accused is compelled, by threat of contempt or perjury, to answer incriminating questions on cross-examination, the accused's answers are certainly not voluntary.

In summary, the United States Supreme Court's opinions initially failed to provide a reasoned analysis of the propriety of the use of waiver principles to describe the effects of the accused's testimony on his fifth amendment privilege.¹³⁸ The most recent Court opinion, however, has attempted to force the accused's act of testifying into the traditional requirements of a waiver of a constitutional right.¹³⁹ In truth, the accused's act of testifying does not comport with the traditional strict requirements of a waiver of a constitutional privilege.¹⁴⁰ The accused takes the stand to testify unaware of the likely consequences of his testimonial "waiver." The Court's inconsistent application of the federal rule of cross-examination as a measure of the breadth of the accused's waiver,¹⁴¹ and the inherent deficiencies of the federal "subject matter" rule of cross-examination¹⁴² militate against the foregoing of a *known* right or privilege. The accused does not normally take the stand intending to subject himself voluntarily to untrammelled prosecution cross-examination requiring incriminating responses.¹⁴³

The government may have interests which justify requiring the accused to *forfeit* certain protections of the privilege should he take the stand and testify. The impairment of the privilege can not rest, however, on a "waiver" of the privilege. Interpreting the accused's testimony as a "waiver" of his constitutional privilege allows the Court to

136. See Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 196 (1977). See notes 81, 82 and accompanying text *supra*.

137. Tigar, *Foreward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 25 (1970).

138. See notes 70-73 and accompanying text *supra*.

139. See notes 74-82 and accompanying text *supra*.

140. See notes 65-68 and accompanying text *supra*.

141. See notes 87-111 and accompanying text *supra*.

142. See notes 112-118 and accompanying text *supra*.

143. See notes 123-137 and accompanying text *supra*.

avoid examining the delicate balance between the government's interests in requiring the accused to forego his privilege and the accused's interest in an unimpaired fifth amendment privilege. If the accused is to be subject to cross-examination because of his testimony, the involuntary impairment of the accused's privilege must rest on the Court's willingness to enforce a *forfeiture* of the privilege. The forfeiture analysis, discussed in the next section of the comment, represents a new approach and will suggest new limitations on the constitutional scope of cross-examination of the accused.

TOWARD A NEW THEORY OF CROSS-EXAMINATION OF AN ACCUSED

The accused has the constitutional right to testify in his own behalf at his criminal trial and to claim the protections of the fifth amendment privilege to government questioning that might tend to incriminate him. The Court's present "waiver" theory,¹⁴⁴ which may in some cases require the accused to forfeit this aspect of the fifth amendment privilege when taking the stand and testifying, burdens the accused's fifth amendment privilege with a choice of whether to testify to his innocence and compels the accused to choose between the exercise of these two rights.¹⁴⁵ This coerced choice impairs to an appreciable extent the policies behind the fifth amendment privilege.¹⁴⁶

This impairment of the accused's privilege must be balanced against the need of society to compel the forfeiture of the right to assure an effective and just criminal justice system.¹⁴⁷ A complete forfeiture of the accused's privilege is not necessitated by the function of the courts of justice to ascertain the truth. New limitations on the scope of the accused's cross-examination must be developed that reflect the accused's right to exercise his privilege and the need of society to ascertain the truth.

A. *Forfeitures of Constitutional Rights*

Constitutional rights do not exist in a vacuum. Their exercise is often accomplished only at great cost to the interests of society.¹⁴⁸ Courts have not permitted individual rights to be exercised in derogation of society's interests and have sought to balance the competing interests to seek equitable results.¹⁴⁹ When the interests of society pre-

144. See notes 49-59 and accompanying text *supra*.

145. See notes 150-153 and accompanying text *infra*.

146. See notes 154-173 and accompanying text *infra*.

147. See notes 176-183 and accompanying text *infra*.

148. See *United States v. Nixon*, 418 U.S. 683, 709-10 (1974).

149. See *Williams v. Florida*, 399 U.S. 78, 81-84 (1970). See generally Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. Q. 279.

vail over the individual's constitutional right, society is justified in requiring the partial or complete forfeiture of the right. Similarly, the proper measure of the accused's fifth amendment privilege requires a balancing of the accused's interest in exercising his privilege free from prosecution cross-examination against the need of society to compel the accused's forfeiture in order to arrive at the truth in its courts of justice.

An accused has a constitutional right to address the factfinder on the issue of his guilt.¹⁵⁰ By requiring that an accused forfeit his privilege in order to exercise the right to testify, the State can burden the accused's fifth amendment privilege by forcing him to choose whether to testify.¹⁵¹

The burden which is placed on the privilege is not a necessary element of a criminal justice system. The accused could, in theory, take the stand, testify in his own behalf, and yet be free from all prosecution cross-examination.¹⁵²

Notwithstanding the theoretical considerations,

[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that same token always forbid requiring him to choose.¹⁵³

The threshold question, as enunciated in *McGautha v. California*,¹⁵⁴ is whether compelling the election "impairs to an appreciable extent any of the policies behind the rights involved."¹⁵⁵

In *McGautha*, Crampton had been sentenced to death under a trial scheme that provided a single proceeding for the guilt and penalty phases of the accused's trial.¹⁵⁶ Crampton claimed that the scheme vio-

150. Some constitutional right has impliedly been recognized by the United States Supreme Court. The question was left open in *Ferguson v. Georgia*, 365 U.S. 570 (1961). Justice Clark, in his concurring opinion to *Ferguson*, found the right to be guaranteed by due process requirements. *Id.* at 602. The Court suggested the possibility of a constitutional basis for the right in *United States v. Grayson*, 438 U.S. 41, 54. Justice Stewart, in his dissenting opinion to *Grayson*, found the right guaranteed by the sixth amendment right to counsel as interpreted in *Faretta v. California*, 422 U.S. 806, 819 (1975). 438 U.S. at 56 n.2. See generally *Wright v. Estelle*, 572 F.2d 1071, 1075-77 (5th Cir. 1978), cert. denied, 439 U.S. 1004 (1980); Clinton, *The Right to Present a Defense: An Emerging Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713 (1975). See also *Goldberg v. Kelly*, 397 U.S. 254, 257-58 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

151. For a similar analysis, see *Simmons v. United States*, 390 U.S. 377, 394 (1968) and *Brooks v. Tennessee*, 406 U.S. 605, 610-11 (1972).

152. Wigmore suggests that this is the English rule. WIGMORE, *supra* note 3, §2276, at 469.

153. *McGautha v. California*, 402 U.S. 183, 213 (1971).

154. *Id.*

155. *Id.* See generally Berger, *Burdening the Fifth Amendment: Toward a Presumptive Barrier Theory*, 70 J. CRIM. L. & CRIMINOLOGY 27 (1979).

156. See 402 U.S. at 191-92. Crampton's case was reviewed with that of *McGautha*.

lated his fifth amendment privilege.¹⁵⁷ The Court found that the tension between the accused's fifth amendment privilege and the accused's right to testify during the penalty phase of his trial did not appreciably impair any of the policies or history of the two rights.¹⁵⁸ The same result is not, however, compelled in the case of an accused who is forced to forfeit his fifth amendment privilege from *compelled incrimination* to testify at the *guilt* phase of his trial.

The fifth amendment privilege does not, of itself, require that the accused forfeit his privilege in order to testify. The intent of the drafters of the Constitution can not readily be gleaned from practices existing in Colonial America. The accused was, at the drafting of the amendment, incompetent to testify in his own behalf at his criminal trial.¹⁵⁹ The absence of the tension between the accused's privilege and his right to testify at the time of the drafting of the amendment does *not* support the conclusion that the privilege was obviously not intended to protect an accused who voluntarily takes the stand.¹⁶⁰ The Constitution is not frozen in time and must adapt to changes in the proceedings of the nation's courts.¹⁶¹

Similarly, the Anglo-American judicial system, champion of the use of cross-examination,¹⁶² does not require that every party or witness testifying before the finder of fact forfeit the privilege to refrain from answering incriminating questions on cross-examination. An ordinary witness traditionally retained the privilege even though a party to the lawsuit.¹⁶³ The accused has always been able to place his case before the finder of fact through witnesses or physical evidence without being subjected to cross-examination. The policies behind the privilege, and not the language of the privilege or its historical setting, must dictate whether to extend its protections to an accused who voluntarily takes the stand and testifies in his own behalf.

The privilege against self-incrimination reflects many of the policies of our judicial system: our unwillingness to subject those suspected of crime to the cruel "trilemma" of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of

157. *Id.* at 208-09.

158. *Id.* at 214-15.

159. See notes 20-29 and accompanying text *supra*.

160. This claim was made in *McGautha v. California*, 402 U.S. 183, 214 (1971).

161. See *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

162. 5 WIGMORE, EVIDENCE §1367, at 32-33 (J. Chadbourn ed. 1974).

163. See notes 43-48 and accompanying text *supra*. In England, at one time, the accused retained the full protection of the privilege and could refrain from answering questions at any point in his testimony. WIGMORE, *supra* note 3, §2276, at 469. Many states at one time permitted the accused to make an unsworn statement to the jury without undergoing cross-examination. See generally *Ferguson v. Georgia*, 365 U.S. 570, 582-87 (1961) (dictum).

criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; and our sense of fair play requiring that the government shoulder the entire responsibility for proving the accused's guilt.¹⁶⁴

Requiring a forfeiture of the accused's privilege when taking the stand to testify subjects the accused to the trilemma of having to choose between self-incrimination, perjury, and contempt. One of the evils sought to be eradicated by the fifth amendment privilege was the "*ex officio* oath" as used by the English Courts of Star Chamber and High Commission.¹⁶⁵ The suspect was involuntarily placed under oath by government agents and then had to choose between self-incrimination, contempt for refusing to testify, and perjury.¹⁶⁶ This policy for the enforcement of the protections of the privilege has generally been thought to be inapplicable to the witness, particularly the accused, in modern courts.¹⁶⁷ The fifth amendment grants the accused the right to refrain from testifying and proscribes comment on the accused's decision to refrain from testifying.¹⁶⁸ Arguably, the accused is not compelled to undergo the trilemma since he has the option of not taking the stand. This argument, however, overlooks the intense pressure on the accused to take the stand.

Modern commentators have emphasized the cost to the accused of not testifying.¹⁶⁹ Accuseds foregoing their right to testify face significantly greater chances of conviction even though their failure to take the stand may not be commented on by the prosecution.¹⁷⁰ The accused is forced, by the increased chances of conviction if he fails to testify, to choose between harmful disclosures brought about by the forfeiture of his privilege, contempt, and perjury. This is not to say that the mere force of the government's case is compelling the accused to

164. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). For a more complete list of the various policies that have been suggested as rationales of the privilege, see WIGMORE, *supra* note 3, §2276.

Concededly, the policy of the privilege protecting accuseds from inhumane treatment and abuse is not impaired by requiring the accused to forfeit his privilege in order to testify. The accused is under the protection of the court when he takes the stand.

165. See Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 770-71, 783-87 (1935).

166. Pittman, *supra* note 165, at 770-71, 783-87.

167. WIGMORE, *supra* note 3, §2276, at 462.

168. *Griffin v. California*, 380 U.S. 609 (1965).

169. Nunnelley, *Practical Trial Techniques*, in CALIFORNIA CRIMINAL LAW PRACTICES §13.28 (1978); TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 390; Williams, *The Trial of a Criminal Case*, 29 N.Y. ST. B. BULL. 36, 42 (1957); Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 433 (1970).

170. See note 169 *supra*. See generally *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. SOC. PROB. 215, 220-26 (1968). See also A. TRAIN, *THE PRISONER AT THE BAR* 209-12 (1923).

forfeit his right.¹⁷¹ If the government is justified in requiring the forfeiture of the accused's privilege when testifying, the government does not burden the accused's choice to either remain silent or testify subject to a "waiver" of his privilege by the mere force of its case. But this analysis assumes that the government *is* justified in requiring the "waiver." Until the Court justifies its enforcement of a forfeiture of the privilege, the "natural pressure" on the accused to testify, created by the force of the prosecution's case, is important only in its effect on the incidence of accuseds forced to forfeit the privilege, not its effect on the very existence of an unjustified impairment of the constitutional right.

The accused's exculpatory direct testimony does not make his involuntary incriminating statements produced on cross-examination any less offensive to a judicial system that requires an accusatory rather than an inquisitory method of proving an accused's guilt.¹⁷² Requiring the accused to forfeit his privilege in order to testify provides the prosecution with an opportunity to "fill-out" a weak case and encourages the prosecution of otherwise frivolous cases. A skillful prosecutor can use cross-examination as a powerful tool to shape the testimony of a nervous and bewildered accused.¹⁷³ The accused can be made to provide missing elements of the prosecution's case-in-chief. The accused runs the risk, when testifying, of supplying vital and incriminating evidence when questioned on cross-examination.

Requiring the accused to forfeit the fifth amendment privilege in order to testify free of cross-examination does impair, to an appreciable extent, the policies behind the fifth amendment privilege. The existence of this impairment does not, however, necessitate the *complete* retention by the accused of the fifth amendment privilege. A determination that the tension between the rights appreciably impairs the policies of the rights involved does not end the analysis set forth in *McGautha*.¹⁷⁴ The impairment of constitutional rights must be balanced against the need of society to compel an election between the rights.¹⁷⁵ Only when the need of society to compel an election between the rights outweighs the need of the individual to exercise both rights free of any impairment is a forfeiture of one or both of the rights justified and constitutional.

171. This argument has properly been rejected by the Court. See *Brady v. United States*, 397 U.S. 742 (1970).

172. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). See WIGMORE, *supra* note 3, §2276, at 318-19.

173. *Wilson v. United States*, 149 U.S. 60, 66 (1893).

174. See notes 154-158 and accompanying text *supra*.

175. See notes 148, 149 *supra*. See generally Wessen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1238 (1976-77).

B. Balancing Competing Interests

The ascertainment of truth is a fundamental goal of our legal system.¹⁷⁶ When an accused takes the stand, the proper functioning of the adversary system requires that the government be permitted proper and effective cross-examination to elicit the truth.¹⁷⁷ A main concern of commentators opposed to the fifth amendment privilege is that it acts as a shield for wholesale acts of perjury.¹⁷⁸ The critics fear that permitting an accused to take the stand, to testify in his own behalf and then to avoid prosecution cross-examination would invite perjury.¹⁷⁹ *Full retention* of the privilege also would allow the accused to distort the picture of the case presented to the factfinder and would hamper the search for truth.¹⁸⁰

These fears are justified. Cross-examination has been termed "the greatest legal engine ever invented for the discovery of the truth."¹⁸¹ Although this claim may be exaggerated,¹⁸² cross-examination does provide an important means of testing a witness' bias, interest in the proceeding, perception, memory, and credibility.¹⁸³ Permitting the accused to escape cross-examination may provide an incentive to commit perjury and remove the accused's testimony from the searching and probing examination of the finder of fact.

Society's compelling need to subject the accused's testimony to cross-examination must, however, be balanced against the individual's right to testify without having to forfeit the fifth amendment privilege. This balance can best be weighed by examining the reduction in the accused's ability to prove his innocence brought about by the forfeiture of his privilege.

Guilty and innocent accuseds are guaranteed the right to have the government shoulder the entire burden of proving their guilt by refraining from taking the stand.¹⁸⁴ They are also able to present evidence of their innocence through witnesses.¹⁸⁵ Finally, every accused is privileged to testify in his own defense.¹⁸⁶

Forfeiture of the accused's privilege does not affect the accused's

176. *United States v. Havens*, 446 U.S. 620, 626 (1980).

177. *Id.* at 626-27.

178. *Brown v. United States*, 356 U.S. 148, 156 (1958).

179. *Id.*

180. *Id.* See generally Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752, 1763-68 (1978-79).

181. 5 WIGMORE, EVIDENCE §1367 (3d ed. 1940).

182. See generally MCCORMICK, *supra* note 21, §31.

183. See MCCORMICK, *supra* note 21, §245.

184. See 356 U.S. at 155.

185. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

186. See *Harris v. United States*, 401 U.S. 222, 225 (1971).

ability to remain silent or present physical evidence. Forfeiture of the accused's privilege does, however, deter testimony by the accused. Nonetheless, the deterrence does not, in all circumstances, violate the principles of the privilege.¹⁸⁷ "Every criminal defendant is privileged to testify in his own behalf or to refuse to do so. But [the privilege to testify] cannot be construed to include the right to commit perjury."¹⁸⁸ Those accuseds who are guilty and willing to perjure themselves by testifying in an exculpatory manner must be satisfied with their right to remain silent or present other witnesses and evidence. They should not be permitted to rely on an opportunity to mislead the jury with their perjurious testimony free from the adversarial test of cross-examination.¹⁸⁹ Those accuseds innocent of the crimes charged may take the stand secure that the veracity of their exculpatory testimony will be upheld on cross-examination. Only those accuseds innocent of the crime charged but susceptible to over-bearing cross-examination need fear the force of prosecution questioning. The number of accuseds fitting this description is hopefully small and does not warrant the right of all accuseds to escape cross-examination. In the balance, society's interest in conducting general cross-examination of all accuseds outweighs the interests of those accuseds who might be deterred from truthfully testifying to their innocence by the threat of cross-examination, and a forfeiture of the accused's privilege on cross-examination is justified.

This analysis does not necessarily require forfeiture of the privilege to prosecution cross-examination on all topics. Some areas of cross-examination are not essential to the function of the courts to ascertain the truth and represent a substantial impairment of an accused's right to testify consonant with the principles of the fifth amendment privilege. A second level of analysis is required to determine the scope of the accused's forfeiture of the privilege. Different topics of cross-examination may require independent weighing of the competing interests.

Courts permit questioning of the accused that requires incriminating responses to offenses other than those to which the accused is charged and has testified.¹⁹⁰ Questions directed to facts supporting prosecution of unresolved offenses to which the accused is not testifying on direct examination have been found to be within the scope of permissible cross-examination of the accused.¹⁹¹ Requiring the accused to forfeit

187. See notes 159-164 and accompanying text *supra*.

188. 401 U.S. at 225.

189. *Id.*

190. See *Johnson v. United States*, 318 U.S. 189, 195 (1943).

191. *E.g.*, *Johnson v. United States*, 318 U.S. 189 (1943); *Powers v. United States*, 223 U.S. 303 (1912); *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 520 (1979).

his privilege to avoid answering questions of this type will not substantially further the need of society to foster the discovery of the truth¹⁹² but instead will impair the accused's free exercise of the fifth amendment privilege.¹⁹³

The accused's ability to claim the privilege on cross-examination of other offenses will not greatly impact society's interest in discovering the truth concerning the crime to which the accused testifies. The accused's ability to avoid questioning of *other offenses* or to introduce false evidence of his innocence of *other offenses* does not greatly distort the factfinder's picture of the accused's guilt of the charged crime to which he has testified to seek acquittal. The relevancy of evidence of other offenses is tangential at best: the finder of fact is first asked to find that the accused has committed another crime and then asked to use an aspect of that crime to *infer* guilt in the case to which the accused is charged. Although the greatest relevancy of this type of evidence is its use to prove a propensity to commit the charged crime, this use of the evidence is strictly prohibited.¹⁹⁴ The accused will, moreover, still be required to answer all questions directed to the crime to which he has testified. Prior convictions may be used to impeach the accused¹⁹⁵ or to show evidence of a common scheme or plan or the accused's intent.¹⁹⁶ Moreover, retaining the privilege as to questions directed to offenses to which the accused has not testified will not encourage perjury because few accuseds will risk the force of prosecution cross-examination if guilty of the charged crime merely to perjure themselves solely on these areas of testimony.

The accused's privilege is greatly compromised by requiring the accused to submit to cross-examination, under threat of perjury or contempt, directed to offenses to which the accused has not testified. Responses to this type of cross-examination can be used in future prosecutions and may provide a substantial basis for securing convictions. Moreover, all accuseds can be threatened by future prosecutions, not just those innocent of the crime to which they have testified. Accuseds guilty of the crime with which they are charged and to which they have testified do not offend the principles of the privilege by claiming the privilege to questions directed at other offenses.¹⁹⁷ This comment sug-

192. See notes 176-183 and accompanying text *supra*.

193. See notes 164-171 and accompanying text *supra*.

194. See FED. R. EVID. 404(b). See generally Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426 (1970). Extrinsic evidence may often be used to prove the accused's conduct without violating the fifth amendment privilege.

195. FED. R. EVID. 609.

196. *Id.* 404(b).

197. The accused *would* offend the principles of the privilege should he take the stand and

gests, therefore, that this type of cross-examination is a dangerous encroachment on the fifth amendment privilege and cannot be justified by society's demand for a fair and effective criminal justice system.¹⁹⁸

In summary, the Court can no longer impair the accused's privilege to refuse to answer incriminating questions on cross-examination under the guise of a "waiver" theory. The accused's act of testifying does not comport with the traditional requirements of a voluntary foregoing of a known right or privilege. The inadequacy of the waiver theory suggests the need for a new analysis of the constitutional limitations on the cross-examination of the accused; an analysis that reflects the competing interests of the accused and society. This section of the comment has suggested that the need of society to foster the function of the courts to ascertain the truth does not outweigh the right of the individual to exercise his fifth amendment privilege to refrain from answering questions that require incriminating responses to offenses other than those to which the accused is charged and has testified.

The accused should, henceforth, *forfeit* his fifth amendment privilege when taking the stand and testifying only to those questions that tend to incriminate the accused of the crime to which he is charged and has testified to seek acquittal.¹⁹⁹ The accused should retain his right to claim the privilege to all questions that pose a real danger of incriminating the accused of offenses to which he has not testified to seek acquittal.²⁰⁰ Evidentiary rules governing the proper scope of cross-examination should no longer be the measure of the accused's privilege.²⁰¹ Questions that require incriminating responses to the crime to which the accused has testified, although outside the proper scope of

perjure himself by falsely claiming his innocence of the other offenses. Nonetheless, the primary purpose of bringing the accused to trial is to convict him of the charged crime, not other offenses. The accused's ability to perjure himself concerning other offenses does not, therefore, greatly compromise the truth-finding function of the courts of justice.

198. See Note, *Privilege of Criminal Defendants and Scope of Cross-Examination*, 5 U. CHI. L. REV. 116, 121-22, n.23 (1937). This principle is already recognized in the area of character evidence used to impeach a witness' credibility. Rule 608(b) of the Federal Rules of Criminal Procedure states that the accused, or a witness, does not waive the privilege against self-incrimination by testifying to matters affecting only the credibility of the witness. See FED. R. EVID. 608(b), Advisory Comm. Note (b).

199. The accused also retains the privilege as to those counts of a multi-count indictment to which he has exercised his right to remain silent. *Contra*, *People v. Perez*, 65 Cal. 2d 615, 621, 422 P.2d 597, 600, 55 Cal. Rptr. 909, 912 (1967).

200. As to these types of questions, the accused is treated as an ordinary witness under *Rogers v. United States*. See notes 43-48 and accompanying text *supra*. The accused's answer need not amount to a confession of crime to be privileged, but need only provide a link in the chain of evidence of guilt. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The accused may be able to avoid the possibility of having to claim the privilege as to one or more counts of a multi-count indictment or information to which he does not intend to testify by filing a pretrial motion of severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. See *Cross v. United States*, 335 F.2d 987, 989-90 (D.C. Cir. 1964). See generally Comment, *Joinder of Counts as a Violation of an Accused's Right to Remain Silent*, 41 TEMP. L.Q. 458 (1968).

201. This analysis necessarily requires overruling *Johnson v. United States*, 318 U.S. 189

direct examination, will not rise to the level of a violation of the accused's constitutional privilege. They are violations of purely *evidentiary* rules and should be treated as non-constitutional error.²⁰²

The prosecution must not be permitted to ask questions of the accused merely to force him to assert his privilege.²⁰³ An area of inquiry that will obviously compel the proper assertion of the accused's privilege, because of the accused's assertion of the privilege to similar questions, must be off limits from prosecution cross-examination.²⁰⁴ Failure to honor this restriction should require sanctions and in extreme cases reversal for prosecution misconduct.

Finally, the government must be able to comment on the accused's failure to testify to facts reasonably within the accused's knowledge and not falling within the accused's remaining privilege. The privilege remains intact as to questions directed to unresolved offenses to which the accused has not testified and may not be impaired by prosecution comment.²⁰⁵

CONCLUSION

Commentators have begun to scrutinize the broad construction of "waivers" of constitutional rights to limit the protection afforded by these rights.²⁰⁶ These commentators suggest that some of the intrusions of constitutional rights that pass as "waivers" do not, in fact, comport with the traditional definition of waivers of constitutional rights.²⁰⁷ This comment has re-examined the appropriateness of defining an accused's affirmative act of taking the stand and testifying as a waiver of the fifth amendment privilege against self-incrimination. This inquiry has become especially important by virtue of the deficiencies of the measure of the scope of the waiver of the accused's privilege. The confusion surrounding the United States Supreme Court's definition of

(1943) and *Powers v. United States*, 223 U.S. 303 (1912). *Brown v. United States*, 340 U.S. 148 (1958), is of questionable validity.

For criticism of the use of the rules of cross-examination as a measure of the accused's waiver, see MCCORMICK, *supra*, note 21, §132; Comment, *Speak No Evil: The Impact of Rule 611(b) on the Accused's Privilege Against Self-Incrimination*, 48 U. CIN. L. REV. 842 (1979).

202. See *Chapman v. California*, 386 U.S. 18, 23-24 (1967).

203. The accused has the option of seeking a ruling, before he testifies, on the permissibility of certain areas of questioning. See, e.g., *United States v. Hearst*, 563 F.2d 1331, 1338-339 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978); *United States v. Beechum*, 582 F.2d 898, 907 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

204. See 582 F.2d at 908 (negative inference).

205. See *Johnson v. United States*, 318 U.S. 189, 196-97 (1943).

206. See Wessen, *Away From Waiver: A Rationale For the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1976-77); Comment, *Speak No Evil: The Impact of Rule 611(b) on the Accused's Privilege Against Self-Incrimination*, 48 U. CIN. L. REV. 842, 849-51 (1979).

207. See note 206 *supra*.

“relevant cross-examination” has deprived the accused of the ability to anticipate and determine the scope of his waiver.²⁰⁸ Even the federal rule of cross-examination, if consistently applied by the Court, would leave the accused with an ambiguous measure of his privilege and a severely diluted constitutional right.²⁰⁹

This comment has demonstrated that the accused’s act of testifying in his own behalf cannot be construed as a waiver. The accused is unable to make a knowing waiver of the privilege because he is unable to ascertain the scope of his waiver²¹⁰ and because the accused does not *voluntarily* answer prosecution questions capable of eliciting incriminating responses.²¹¹

If the accused is to be denied the protections of the privilege by taking the stand and testifying, the Court must base this denial upon a forfeiture of the privilege. The Court must demonstrate that the need of society to further the function of the courts to ascertain the truth outweighs the individual’s right to exercise the fifth amendment privilege to refuse answering incriminating questions on cross-examination unburdened by the decision of whether to exercise his right to testify to his innocence. This comment has suggested that the Court is justified in enforcing a forfeiture of the fifth amendment privilege to refuse to answer only those questions that tend to incriminate the accused of the crime with which he is charged and to which he has taken the stand and testified. The fifth amendment privilege against self-incrimination is impaired by compelling the accused to answer cross-examination questions that would tend to incriminate the accused of offenses to which he has not taken the stand to testify in an effort to avoid conviction.

The proposal offered by this author is a compromise of the competing interests of society and the individual. The proposal offers certainty and a partial retention of the privilege to the accused. The proposal offers society the freedom to subject that part of the accused’s testimony that bears directly on the crime with which he is charged and has testified to the exacting test of government cross-examination. The present rule offers only confusion to the accused and the government, endless

208. See notes 87-111 and accompanying text *supra*.

209. See notes 112-116 and accompanying text *supra*.

210. See notes 87-116 and accompanying text *supra*.

211. See notes 123-137 and accompanying text *supra*.

relitigation on appeal of the accused's claim of violations of his fifth amendment privilege, and drastic impairment of the accused's privilege.

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